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FEDERAL POWER TO OWN AND OPERATE RAILROADS IN PEACE TIME

UNQUESTIONABLY there are decisions of the Supreme Court of the United States which afford a reasonable basis for the contention that the United States is vested with the power to acquire and operate the railroads used in the transportation of interstate commerce. But as the facts involved in those cases were so different from those which would be presented should an effort be made to exercise such power, this constitutional question cannot be regarded as so firmly settled that it is not worthy of consideration.

It will hardly be insisted that such power is vested in the general government under the clause of the Constitution which authorizes Congress "to establish post-offices and post-roads," although that clause has been mentioned by the Supreme Court as one reason why Congress may construct or authorize the construction of a railroad from one state into another.[1] The carrying of mails is but a small incident to the ownership and operation of railroads; and it cannot be believed that the general government has the power to embark in an enterprise so gigantic for such an incidental purpose.

The power, if it exists, must be found in Article I, Section 8, clause 3, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In interpreting this clause the Supreme Court soon held that Congressional jurisdiction extended not only to transportation itself, but also to the goods transported, and to the ways and instruments of, and the individuals engaged in, transportation. Those cases which involved the ownership by the government of the ways and means of transportation are here of special interest.

Early in the nineteenth century Congress appropriated $710,000 toward the construction of a highway from Cumberland, Mary-

1 California *v.* Central Pac. R. R. Co., 127 U. S. 1 (1887).

land, to the state of Ohio. Apparently the legality of this appropriation was not attacked; and it has been often recognized by the Supreme Court as valid because designed to promote interstate commerce.[2]

In *California* v. *Central Pacific Railroad Company*, in referring to the action of Congress in granting lands and franchises to the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company, the Supreme Court said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce."[3]

So in *Luxton* v. *North River Bridge Company*, the court said:

"Although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that purpose, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."[4]

United States v. *Jones*[5] involved certain locks, dams, canals, and franchises situated between Wisconsin River and the mouth of Fox River, which the United States had acquired from the Green Bay & Mississippi Canal Company, and the power of the United States to own them was not questioned. *Monongahela Navigation Company* v. *United States*[6] was a proceeding brought by the United States to condemn for navigation purposes certain locks and dams which had been erected by the defendant under authority granted by the legislature of Pennsylvania; and the power of the government to condemn the property for that purpose was not contested.

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[2] California *v.* Central Pac. R. R. Co., 127 U. S. 1, 39 (1887); Indiana *v.* United States, 148 U. S. 148 (1893); Wilson *v.* Shaw, 204 U. S. 24, 35 (1907).

[3] California *v.* Central Pac. R. R. Co., 127 U. S. 1, 39 (1889).

[4] Luxton *v.* North River Bridge Co., 153 U. S. 525, 530 (1894).

[5] 109 U. S. 513 (1883).

[6] 148 U. S. 312 (1893).

United States v. *Chandler-Dunbar Company* [7] was one of the last cases before the Supreme Court involving the ownership by the United States of transportation ways. Congress had declared by act "that the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith," and authorized the condemnation of the territory described for the construction of additional canals, locks, and dams. It was regarded as settled that the United States had the power to acquire and hold this property, and the important questions determined related to the elements of damages for which the United States is liable in such cases.

These are illustrative of a number of cases in which the power of the United States to own the ways along which interstate and foreign commerce is transported is recognized. But do any number of decisions of that character settle beyond doubt that the United States has the power to own and operate in times of peace all the railroads of the United States engaged in interstate commerce?

The Constitution of the United States, like all other instruments, must be construed as a whole. Consequently in determining the extent of the powers granted to the general government by one of its clauses, it is necessary to consider all other clauses bearing upon the same subject.

Again, the language of a clause may be so general that it will admit of a construction vesting unlimited power in the general government as to the matter to which the clause relates. Yet a point may be reached beyond which it is perfectly apparent that the authors of the Constitution could not possibly have intended the power to extend, and to go beyond which would throw the entire instrument out of equilibrium and thus practically create a new constitution. The courts will not write a new constitution in that way; and hence there may be some limit even to the powers conferred by the commerce clause, although the courts have very properly held that it is far reaching in its scope.

As the power is claimed under the commerce clause of the

[7] 229 U. S. 53 (1913).

Constitution, it is not insisted that it exists as to roads engaged exclusively in intrastate commerce. But are there any such roads? In order to engage in interstate or foreign commerce it is not necessary that the road extend from one state into another. If it is the initial, intermediate, or ultimate carrier of articles, the transportation of which originates in one state with their destination in another state or foreign country, or originates in a foreign country with their destination in the United States, it is engaged in interstate or foreign commerce. Nor is it necessary that such commerce be very great as compared with the total traffic carried in order to make the road subject to congressional legislation. This is illustrated by the case of *United States* v. *Colorado & North Western Railroad Company*,[8] decided by the United States Circuit Court of Appeals, Eighth Circuit. The company owned a short line of narrow gauge road situated wholly in the state of Colorado. A small shipment of hardware originating at Omaha, Nebraska, and a shipment of paper tablets originating at Kansas City, Missouri, were carried on one of its trains to points on its line in cars not equipped with safety appliances. They were not carried on through bills of lading, and there was no common control or management between this line and the lines from which the goods were received. Yet the court held that the company was subject to the provisions of the Safety Appliance Act and imposed the prescribed penalty. It is true that the Court of Appeals, Sixth Circuit, held to the contrary in a case presenting similar facts, but that decision was based primarily on the construction of the act itself, and not on the want of power in Congress to legislate upon the subject.

There is certainly no short line of road that does not carry some commerce destined to, or originating at, a point outside the state in which it is located; and, therefore, according to the advocates of government ownership, the United States can acquire by purchase or condemnation and operate all the railroad lines in the United States.

Let us assume that the United States possesses such power. If it were exercised, thereafter the states could not impose taxes of any kind upon railroad property, would have no control whatever over the operation of trains, the maintenance of ways, or

[8] 157 Fed. 321 (1907).

the manner or methods of conducting the transportation business by railroads, and could neither prescribe nor regulate in any way the rates for carrying intrastate commerce by rail. In other words, all power of the states with reference to the regulation or control over intrastate commerce in every respect, in so far as carried by rail, would be destroyed.

This would be the necessary result, because, so far as the power of the United States extends, its sovereignty is supreme and admits of no restraints or limitations by the states. Not only is this a necessary implication arising from the granting of power to the United States, but as to the control of its property it is expressly provided by Article IV, Section 3, clause 2 of the Constitution, that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If the power to make *all* needful rules and regulations respecting its property is in the United States, the states can possess no power to make any such rules and regulations except by consent of the United States expressed or implied. This proposition is self-evident, but a brief review of the authorities relating to the subject will show how the principle has been applied.

In *McCulloch* v. *Maryland*[9] it was held that the state of Maryland had no power to impose a tax upon the operation of a branch of the Bank of the United States, the court saying:

"The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them."[10]

It was once supposed that property owned by the United States other than that expressly designated in Article I, Section 8, clause 17 of the Constitution, to wit, places purchased by the consent

[9] 4 Wheat. (U. S.) 317 (1819).
[10] *Ibid.*, 429.

of the legislatures of the states for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, was subject to taxation by the states in which it was located; and there were *dicta* of the Supreme Court of the United States and some decisions of state courts to that effect. But in *Van Brocklin* v. *State of Tennessee*,[11] it was held without a dissenting voice, that lands situated in a state, which are acquired by the United States through sales for direct taxes, levied pursuant to act of Congress, are not subject to state taxation while so owned by the United States. The court repeated in substance the above quotation from the opinion in *McCulloch* v. *Maryland*, and also said:

"The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[12]

In *Wisconsin Central Railroad Company* v. *Price County*,[13] it was held that as long as the government retained such right or interest in lands owned by it, as justified their withholding a patent from the donee or purchaser, such land was not subject to taxation by the state. After quoting Article IV, Section 3, of the Constitution the court said:

"And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."[14]

In *United States* v. *Gratiot*,[15] which involved the leasing of minerals belonging to the United States, the court, in referring to this clause of the Constitution, said:

"The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And congress has the same power over it as over *any other property* belonging to the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest."[16]

It was thus recognized that the provision applies to all lands and all other property belonging to the United States regardless of how acquired. In fact this clause could not be otherwise inter-

[11] 117 U. S. 151, 156 (1886).
[12] *Ibid.*, 155.
[13] 133 U. S. 496 (1890).
[14] *Ibid.*, 504.
[15] 14 Pet. (U. S.) 526 (1840).
[16] *Ibid.*, 537 (italics are writer's).

preted. It has probably been applied most frequently in cases involving the public lands of the United States; and a few of those cases will illustrate how far it has been held to extend.

In 1885 Congress passed an act which prohibited the fencing of public lands; and *Camfield* v. *United States*[17] was an action in equity to compel the removal of a fence which had been erected by the defendant around government lands situated in Colorado. With reference to the jurisdiction of the United States over these lands the court said:

"While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preëmption or homestead settlement."[18]

But later in its opinion the court said:

"The general Government doubtless has a power over its own property *analogous to the police power of the several States*, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."[19]

And Camfield was required to remove his fence, though there was no state law relating to the matter.

In *United States* v. *Grimaud*,[20] an indictment was sustained which alleged the violation in California of a regulation of the Secretary of Agriculture adopted under a statute authorizing him "to make such rules and regulations and establish such service [respecting forest reservations] as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."

Therefore Congress may provide for the control of its property by regulations enforceable by either civil or criminal proceedings. In fact a number of sections of the criminal code relate to trespasses upon and injuries to the public lands and the robbery, larceny, and embezzlement of the personal property of the United

[17] 167 U. S. 518 (1897).
[18] *Ibid.*, 524, 525.
[19] *Ibid.* (italics are writer's).
[20] 220 U. S. 506 (1911).

States, and these statutes are enforced regardless of where the property is located.

In *United States* v. *Chicago*,[21] the court said:

"It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain."

It appeared from this language that a state has some paramount sovereignty over property within its territory which belonged to the United States, but had not been ceded by the state for the purposes designated in Article I, Section 8, clause 17 of the Constitution. But this early dictum was disregarded in *Utah Power & Light Co.* v. *United States*,[22] where the question whether a state has the power to authorize the condemnation of property belonging to the United States was directly presented. After citing many authorities the court said:

"And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. 'A different rule,' as was said in *Camfield* v. *United States*, *supra*, 'would place the public domain of the United States completely at the mercy of state legislation.'

"It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."[23]

And with reference to the respective sovereign rights of the United States and the states over such lands the court said:

"True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or

[21] 7 How. (U. S.) 185, 190, 194 (1849).
[22] 243 U. S. 389 (1917).
[23] *Ibid.*, 405.

larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them."[24]

If the United States owned the railroads, it would have the same jurisdiction over the rights of way, stations and station grounds, shops and other realty, as it has over its public lands lying within the states. And its power would be equally exclusive over all other property owned by it and used in connection with the operation of the roads, and also over their operation itself.

Therefore, if the United States can lawfully acquire, hold, and operate the railroads of the United States, under the guise of regulating interstate and foreign commerce, it can destroy absolutely the power of the states to regulate or exercise any control whatever over the enormous flow of intrastate commerce which is carried by rail.

When the Constitution is construed as a whole, can the power merely to regulate interstate and foreign commerce be so extended by construction as to exclude the states from the exercise of any control over their intrastate commerce?

It has been so generally understood that while the Congress is vested with the power to regulate interstate and foreign commerce there is reserved to the states the power to regulate intrastate commerce, that it would appear useless to comment upon the authorities relating to that subject.

The constitutional provisions relating to the subject appear to be perfectly plain. The tenth amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This amendment was really interpretative only, and was adopted to allay existing fears that an attempt might be made to invade the reserved powers of the states. But reservations which previously existed by mere implication thereafter rested also upon a positive declaration. Before the Constitution was adopted, the power to control all kinds of commerce was vested absolutely in the states. But in adopting that instrument the people divided that power between the Congress and the states; and it certainly was not intended that the one could by any device destroy the power vested in the other. And the subse-

[24] 243 U. S. 404 (1917).

quent adoption of the tenth amendment shows that that was especially true with reference to the invasion of the power of the states by the United States.

It is apparent, therefore, that the construction and ownership of a lock and dam at a point in a navigable stream where it is much needed, or the authorizing of and aiding in the construction of a transcontinental line of road when private capital could not be induced to undertake unaided such enterprise, are so insignificant in comparison with the ownership and operation of all the railroads of the country, that the court's action upon those questions cannot be regarded as precedents at all controlling. In those cases the ownership of the means of transportation was a mere incident; but in the contemplated case the government's business interests would be so vast, and the enterprise so complicated and of such magnitude, that the regulation of interstate and foreign commerce would become a mere incident.

But because of the enormous flow of both intrastate and interstate and foreign commerce and their necessary intermingling in transportation, and of the repeated applications to varying states of facts by the Supreme Court of the principle that the power of the United States is exclusive as far as it extends and embraces every reasonable means of enforcing or exercising a power conferred, there is some uncertainty as to how far Congress may affect by legislation commerce wholly within a state.

A few cases will illustrate how far it has been held that the power of the states over intrastate commerce has been restricted by the commerce clause.

Louisville & Nashville R. R. Co. v. *Eubank*[25] involved the validity, in so far as it affected interstate commerce, of the clause of the constitution of the state of Kentucky which prohibited the charging of a greater sum for a shorter than for a longer haul over the same line. The Railroad Company operated a line of road between Nashville, Tennessee, and Louisville, Kentucky, a distance of one hundred and eighty-five miles. This road passed through Franklin, Kentucky. The company had transported tobacco from Franklin to Louisville, the shorter distance entirely within the state, at the rate of twenty-five cents per one hundred pounds, while at the same time it was transporting tobacco from Nashville

[25] 184 U. S. 27 (1902).

to Louisville, the longer and interstate haul, at twelve cents per one hundred pounds. The twenty-five cent rate between Franklin and Louisville was conceded to be reasonable, but between Nashville and Louisville there was water competition, and a twenty-five cent charge would have destroyed the company's tobacco traffic between those two points. The Court of Appeals of Kentucky held that the provision was applicable, and that the shipper was entitled to recover the amount of the discrimination against him. The Supreme Court of the United States reversed this judgment, holding that the clause of the Constitution, in so far as construed to apply to the relationship between an intrastate and an interstate rate, directly affected interstate commerce and was invalid.

A case of the same nature, but which extended the principle farther, was *Houston, etc. Texas R. R.* v. *United States*.[26] That was an action brought by the railroad companies to enjoin an order of the Interstate Commerce Commission directing that the roads cease to discriminate in rates against Shreveport, Louisiana, and in favor of Houston and Dallas, Texas. Acting under orders of the Railroad Commission of the State of Texas, the roads had fixed very materially lower rates on certain articles shipped from Houston and Dallas to interior Texas points than they were charging on the same articles shipped from Shreveport, Louisiana, to such points. The Interstate Commerce Commission fixed reasonable maximum rates for the interstate shipments and ordered that the roads cease discriminating in favor of the intrastate shipments. It was insisted that the Interstate Commerce Commission had no jurisdiction whatever over the intrastate rates, and that any order made affecting them was a nullity. This contention was overruled, the court holding that the intrastate rates directly affected the flow of interstate commerce, and that the order of the commission relieved the railroads from the duty of observing the orders of the state railroad commission. After citing many cases the court said:

"While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate

[26] 234 U. S. 342 (1914).

operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."[27]

And again:

"It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."[28]

This language of the court would admit of a broad application, but it should be considered in connection with the facts to which it was actually applied.

The *Minnesota Rate Cases*[29] was an attack upon the orders of the Railroad and Warehouse Commission and the legislative acts of the state of Minnesota prescribing maximum rates for freight and a maximum fare of two cents a mile for passengers. It was insisted that as to certain localities the rates disturbed the relationship previously existing between interstate and intrastate rates, thus imposing a burden upon interstate commerce and causing discriminations against localities outside the state.

The court in effect held that *in the absence of Congressional legislation* the states have the power to establish for intrastate commerce rates which are reasonable, that is, rates which the state could constitutionally fix, regardless of their incidental effect upon interstate commerce, and that Congress had not undertaken to deprive them of that power in the enactment of the interstate commerce laws. But after mentioning the contentions of the railroad companies that the same facilities were used for the transportation of both interstate and intrastate traffic, and that the two classes of traffic were continually intermingled, and it was practically impossible to keep them separate, the court said:

[27] 234 U. S. 353 (1914).

[28] *Ibid.*, 354.

[29] 230 U. S. 352, 432 (1913).

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply."[30]

It was thus recognized that circumstances may exist under which Congress may regulate to an extent rates on intrastate traffic.

In *Reagan* v. *Mercantile Trust Co.*[31] and *Smyth* v. *Ames*,[32] the question was presented whether Congress could control intrastate commerce through the medium of a corporation organized under a charter granted by it. The insistence was that inasmuch as all of the franchises of the corporation had been derived from Congress, among which was the right to charge and collect tolls, the state had no power to limit or qualify them, and hence that Congress alone had the power to regulate the rates to be charged by the corporation. The court held in both cases that Congress had not by the act incorporating the company signified an intent to remove the corporation entirely from the control of the states, but passed over the question whether Congress had the power to do so or not. The evasion of this question by the court is somewhat surprising. It is difficult to understand how Congress can, through a corporation created by it, exercise a power which it does not constitutionally possess. Its authority to create a corporation organized for commercial purposes is derived from the commerce clause of the Constitution.[33] And it certainly cannot confer upon a corporation power over commerce which it cannot exercise itself, but which has been reserved to the states.

The power of Congress to pass legislation which affects intrastate commerce is further illustrated by the Hours of Service Act,

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[30] 230 U. S. 432, 433 (1913).

[31] 154 U. S. 413 (1894).

[32] 169 U. S. 466 (1898)

[33] California *v.* Central Pacific R. R., 127 U. S. 1, 39 (1888); Luxton *v.* North River Bridge Co., 153 U. S. 525, 529 (1894).

the safety appliance acts, the last Employers' Liability Act, and the Adamson Bill, and the decisions of the Supreme Court sustaining them.[34] These cases show that the power which Congress may exercise under the commerce clause is very comprehensive. Yet is there any doubt that there exists in the states a power over railroad companies engaged in interstate commerce which Congress cannot destroy or impair?

That the existence of such power has always been recognized by the Supreme Court of the United States is manifest from numerous declarations of that body to that effect. Thus in *Gibbons* v. *Ogden*,[35] in speaking of the commerce clause, it was said:

"The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself."

In *License Tax Cases*[36] the court said:

"But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States."

In the *Trade-Mark Cases*[37] the court said:

"While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress."

In *Northern Securities Co.* v. *United States*,[38] after citing the cases in which the state courts had held combinations in violation of state laws invalid, the court said:

"Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and inter-

[34] Baltimore & Ohio R. R. Co. *v.* Int. Com. Com'n, 221 U. S. 612 (1911); Southern Ry. Co. *v.* United States, 222 U. S. 20 (1911); Second Employers' Liability Cases, 223 U. S. 1 (1912).

[35] 9 Wheat. (U. S.) 1, 195 (1824).

[36] 5 Wall. (U. S.) 462, 470, 471 (1866).

[37] 100 U. S. 82, 96 (1879).

[38] 193 U. S. 197, 342 (1904).

national commerce is as full and complete as is the power of any State over its domestic commerce?"

Like expressions occur in numerous other cases, among them those above cited which construe most broadly the commerce clause of the Constitution.

But if any doubt had arisen that because of the intimate association of interstate and intrastate commerce growing out of modern methods of transportation the United States could assume full control over all the business and activities of a carrier of interstate commerce, that doubt was put to rest by the decision of the Supreme Court in the first *Employers' Liability Cases*.[39] The act there attacked was held unconstitutional because liability was made to rest on the mere fact that the employer was engaged in interstate commerce, and not upon the connection the act of negligence, upon which liability was predicated, had with interstate commerce. Upon this subject the court said:

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. . . . It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."[40]

Four justices dissented on the ground that the act could and should have been so construed as to apply only to accidents directly connected with interstate commerce and to employees when engaged in such commerce. But all agreed that it was unconstitutional if the interpretation of the majority was correct.

The second Employers' Liability Act by express language applied to common carriers by railroad only "while engaging in

[39] 207 U. S. 463 (1908).

[40] *Ibid.*, 502.

commerce between" the states, etc., and only to persons suffering injuries while "employed by such carrier in such commerce"; and it was held without dissent to be constitutional.[41] And upon the same distinction the validity of the Hours of Service Act was maintained.

It is therefore conclusively settled that the fact that a common carrier is engaged in interstate commerce does not subject it to the control of Congress in every respect and as to all of its acts, and that Congress has no authority whatever over such carriers as to matters not directly connected with interstate or foreign commerce. That every common carrier by rail has an enormous amount of traffic, which is strictly intrastate business, and that a very large per cent of its activities have no immediate connection with interstate commerce, cannot be questioned. As was said by the court in the Trade-Mark cases, perhaps the greater volume of business is thus beyond the power of Congress.

Then, if Congress has no constitutional power to regulate or control in any way intrastate rates that do not directly burden or affect interstate or foreign commerce; if it cannot prescribe hours of service for employees of carriers by rail except while employed in connection with such commerce; if it can prescribe no rule of liability between the carrier and its employees except as to accidents occurring in connection with such traffic; in short, if it possesses no power to exercise control in any respect over the traffic and transactions of such carriers which are strictly local and do not directly affect interstate or foreign commerce, how can it possibly possess the power to acquire and operate properties which will necessitate the doing of these very things which it has no power to do?

If the roads when purchased and while operated by the United States Government would remain as to local matters subject to the control of the states, of course there would be no basis for the objection. But as heretofore shown, such would not be the case. By Article IV, Section 3, clause 2 of the Constitution, whenever the United States acquires property, that government alone can exercise control over it, and the states are stripped of all power to participate in or interfere with that control except by consent of Congress. Then the situation is this: By the division of power

[41] Second Employers' Liability Cases, 223 U. S. 1 (1912).

prescribed by the commerce clause and the tenth amendment, the United States is prohibited from exercising any control over carriers by rail as to strictly local matters. By the clause of the Constitution relating to the ownership of property, exclusive control over its property is vested in the United States. Therefore, the ownership of the roads would necessitate, by virtue of the one clause, the exercise of a power by the United States which it is prohibited from exercising by the other; and certainly that cannot be done which would necessarily produce a condition that cannot lawfully exist. In other words, the contention that the United States Government can own and operate the railroads rests upon the theory that by implication such power is vested in the government by the very clause which, when read with the tenth amendment and Article IV, Section 3 of the Constitution, positively prohibits it.

As no railroad system could possibly survive without carrying intrastate traffic, it is hardly conceivable that an effort will ever be made to acquire the roads for the purpose of carrying interstate and foreign commerce alone. But is Congress vested with power to acquire and operate the roads solely for that purpose?

The arguments against the power to do so, for carrying all classes of commerce indiscriminately, apply with equal force to their acquisition and use for carrying interstate commerce alone.

Regardless of the kind of traffic it carries, there are a great many activities necessary in the operation of a line of road which are purely local, and over which Congress has no control. For illustration: an employee is not engaged in interstate commerce while taking down and putting up fixtures in a machine shop operated by the company for repairing locomotives used in both intrastate and interstate commerce.[42] Nor is an employee so engaged while removing coal from storage tracks to coal chutes, even though the coal had been previously brought from another state and was to be used by locomotives in interstate commerce.[43] And of course matters of like character are innumerable. Because of the constant intermingling of intrastate with interstate and

[42] Shanks *v.* Del., Lack. & W. R. R. Co., 239 U. S. 556 (1916).

[43] Chic., Bur. & Quincy R. R. Co. *v.* Harrington, 241 U. S. 177 (1916); Lehigh Valley R. R. Co. *v.* Barlow, 244 U. S. 183 (1917).

foreign commerce, in fact but few things of a strictly local character are now done in operating a road that would not be done by a road hauling exclusively interstate and foreign commerce.

Finally, the history of the times when the Constitution was adopted, the well-known conception of the proper functions of government entertained by its framers, the traditions of the government from its foundation to the present time, and the construction placed upon the commerce clause by the Supreme Court of the United States in the innumerable cases determined by it involving that clause, show beyond question that the power vested in Congress is to *regulate* interstate and foreign commerce, and not to own the instrumentalities of such commerce except in peculiar instances and to a limited extent, where such ownership may create, prevent the destruction of, or greatly promote such commerce.

While a constitutional provision expressing a fundamental principle of government may be sufficiently flexible to permit adjustment to changed conditions of society, it can admit of no radical alteration by mere interpretation.

Those who formulated the Constitution believed in individual liberty and opportunities, and regarded that government best which subjects its citizens to as few restraints, and gives them as many opportunities for success, as is consistent with the welfare of society. In other words, they believed that the true functions of government are to protect individuals against injury and oppression from others and to see that every citizen has a fair and equal chance, and that it is not a proper function to exclude the citizen from any naturally legitimate line of enterprise. This general theory of government was also entertained by those to whom the Constitution was submitted for adoption; and the course of congressional legislation and judicial decisions, and especially the utterances of the greatest statesmen, have been in harmony with it.

The class of business greater than any other one class is that of transportation. No other class has required greater initiative and ability for its development and successful operation. Certainly neither the members of the constitutional convention nor the statesmen who urged the acceptance of the Constitution by the people of the states contemplated that, under the guise of *regulating* interstate and foreign commerce, the transportation of all

kinds of commerce might be taken over by the United States and be entirely removed from the domain of private enterprise.

There was one kind of business in which it was contemplated the United States Government might engage, and that was the transportation of mails; and with reference to that it was provided that Congress shall have power "to establish post-offices and post-roads." But with reference to interstate and foreign commerce only the power "to regulate" was conferred; and a distinction must have been intended between the power "to establish" the instrumentalities for carrying the mails and the power "to regulate" interstate and foreign commerce, which includes the instrumentalities of the transportation.

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